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July 24, 2002

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling On the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1), ~~WC Docket No. 02-89~~ 02-148 02-189

Dear Ms. Dortch:

This *ex parte letter* addresses arguments raised by Qwest Communications International, Inc. ("Qwest") for the first time in its June 20, 2002 reply comments ("Qwest Reply") in the above-captioned proceedings.

The comments in this proceeding were unanimous in their opposition to Qwest's Petition for Declaratory Ruling ("Petition") and in their view that Qwest's proposed construction of the interconnection agreement filing requirement – or, more precisely, Qwest's position that its obligation to file "any" interconnection agreement is almost entirely discretionary – conflicts with the statute's plain meaning.[1] Qwest asserts on reply that these unanimous *opposing*

[1] *See, e.g.*, Comments of Sprint Corporation ("Sprint") at 2-3; Comments of WorldCom, Inc. ("WorldCom") at 2-3; Comments of Mpower Communications Corp. ("Mpower") at 7; Comments of Focal Communications Corp. and Pac-West Telecomm, Inc. ("Focal and Pac-West") at 2-5; Opposition of Touch America, Inc. ("Touch America") at 7-8; Comments of the Attorney General of the State of New Mexico and the Iowa Office of Consumer Advocate ("New Mexico Attorney General and Iowa Consumer Advocate") at 13-14; Comments of the Minnesota Department of Commerce ("Minnesota") at 28-32; and Comments of Iowa Utilities Board. The uniform opposition of CLECs to Qwest's Petition wholly refutes Qwest's assertion that "all parties" would benefit from a declaratory ruling. Qwest Reply at 2-3. *See* Comments of New Edge Network, Inc. at 3 (suggesting that "the number of competitive providers filing comments supporting Qwest's Petition will provide a better indication of whether or not competitive

comments (by state commissions, among others) nonetheless *bolster* its Petition, because "different parties offer inconsistent interpretations" of section 252(a)(1). *See* Qwest Reply at 7. In fact, the constructions offered by the various commenters are remarkably similar on the core issue of which "interconnection agreements" must be filed – as the statute makes clear, all of them.[2] Qwest points out that parties may, on occasion, disagree at the margins whether a *particular* contract is an "interconnection agreement," but the Commission can hardly be expected to expend its scarce resources to anticipate and classify all possible outliers. There is certainly no pressing need to do so. Qwest claims that "clarification of the law is crucial so that parties can comply with its terms," Qwest Reply at 6, but no one but Qwest seems to have had any problem understanding that all interconnection agreements – and not just some agreements or portions thereof – must be filed. The reality, of course, is that Qwest understands perfectly well that its legal position is meritless. Qwest's "primary goal" here is not simply to "obtain clarification," Qwest Reply at 2, but rather to insulate itself for as long as possible from the myriad legal consequences of its patently unlawful conduct, particularly the Section 271 consequences of its secret deal discrimination.[3]

And if anyone is offering inconsistent interpretations, it is Qwest. In its Petition, Qwest took the position, and asked the Commission to issue a ruling declaring, that Congress intended filing of only the schedule of itemized charges with accompanying service descriptions and a "description of the basic OSS functionalities." Pet. at 29. Qwest makes similar assertions in its reply comments. *See, e.g.*, Reply at 3 ("Congress required prior regulatory approval for certain matters, focusing on 'a detailed schedule of itemized charges for interconnection and each service or network element' subject to Section 251 – that is, interconnection product offerings and the rates charged for them"). Yet elsewhere in the same document, Qwest proposes a broader interpretation of the filing requirement. *See, e.g.*, Reply at 14 (filing

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providers agree with Qwest's assertions regarding the benefits to competitive providers"); Reply Comments of the Association of Communications Enterprises at 2 (noting that "it is extremely rare for a Declaratory Petition to generate such universal opposition").

[2] *See, e.g.*, Opposition of AT&T Corp. ("AT&T") at 6 ("section 252 clearly and unequivocally requires the filing of *all* provisions of negotiated interconnection agreements") (emphasis in original); Sprint at 1 ("ILECs are required under this section to file with the State commission both rate and non-rate interconnection, service and UNE agreements"); WorldCom at 2 ("By its terms, section 252(a)(1) mandates that voluntarily negotiated interconnection agreements be submitted to the state commission for approval – in their entirety"); Minnesota at 29 ("[a]ll interconnection agreements must be filed"); *id.* at 32 ("Interconnection agreements are those agreements that contain terms and conditions that fulfill the ILECs' duties set out in Sections 251(b) and (c) and/or their obligations under Section 271(c)(2)(B)").

[3] As AT&T has explained elsewhere, Qwest's gambit is, in any event, pointless, because there is no possible resolution of this proceeding that could erase Qwest's pervasive discrimination or its section 271 consequences.

requirement applies to agreements addressing "the rates and/or the key terms and conditions of interconnection matters"); *id.* at 23 n.41 (suggesting that not "only rates," but also "terms and conditions" are included in the filing requirement). Qwest's constantly shifting position is simply further confirmation that its position is completely untethered from the statutory language.

Qwest also asserts that "[n]o party refutes Qwest's showing, in the Petition, that the legislative history supports Qwest's interpretation of Section 252(a)(1)." Qwest Reply at 17. As an initial matter, there is no basis to resort to legislative history to divine congressional intent because the statutory language is clear. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994). In any event, the legislative history does not support Qwest's proposed construction. It is, of course, true, as Qwest notes, that Congress intended to encourage private negotiation of interconnection agreements. Qwest Pet. at 14. But Congress also ultimately provided for state review and approval of all such agreements to ensure that they could not be used as vehicles for "discriminat[ion] against a telecommunications carrier not a party to the agreement." 47 U.S.C. § 252(e)(2)(A)(i). Thus, Congress's general "emphasis on negotiated agreements," Qwest Pet. at 14, in no way demonstrates that Congress intended incumbent LECs to file only the rate-related portion of a negotiated agreement. Rather, Congress's desire to encourage negotiated agreements is reflected in the very limited grounds state commissions have for disapproving such agreements, *i.e.*, discrimination or inconsistency with the public interest, *see* § 252(e)(2)(A)(i). The filing requirement's fundamental purpose, however, is to ensure that state commissions can detect and prevent discrimination embodied in privately negotiated contracts, and achievement of that purpose requires the filing of the entire contract.

In the absence of legal authority, Qwest elevates its policy argument that it would be useful to ignore the statutory language, because the 90-day approval process for negotiated agreements is an impediment to business dealings between ILECs and CLECs. *See, e.g.*, Qwest Reply at 3; *id.* at 19. But Qwest finally concedes that AT&T "may be correct" that nothing in section 252 or any other provision of the Act prevents parties from voluntarily abiding by the terms of interconnection agreements prior to state commission approval. Qwest Reply at 19-20. Qwest contends that this is "beside the point" because the "lack of legal certainty about the validity" of agreements during the 90-day period adversely impacts business dealings. *Id.* As AT&T explained, however, any such "uncertainty" is minimal, because negotiated interconnection agreements are rarely, *if ever*, disapproved by state commissions, presumably because the public filing and approval requirements have served their purpose in discouraging blatant discrimination. AT&T at 13. And Qwest's emphasis of this argument is particularly odd given that Qwest conceded in its Petition that it "has often implemented agreements early," before a state commission has approved them, "to accommodate CLEC needs." Pet. at 21. Thus, if Qwest was truly concerned that CLECs be able to implement negotiated agreements as soon as possible, it would need only to cooperate in the voluntary implementation of those agreements.

Moreover, if the statutory approval process was, in fact, an impediment to negotiated interconnection agreements, one would have expected CLECs, which bear the entire burden of any unnecessary delay in this context, to bring these concerns to the Commission's attention. Not one CLEC, however, supports Qwest.[4] To the contrary, CLEC commenters have explained that the Act's filing and approval process is *not* a practical barrier to business dealings. *See, e.g.*, Sprint at 3 ("Both the ILEC and CLEC, to the extent they have been complying with Section 252(a), are currently operating under this 90-day window and presumably can plan their activities accordingly"); *id.* ("The costs of a possible delay in implementing certain material service provisions are likely to be significantly outweighed by the benefits of preventing unjust discrimination and of fostering local competition"); Mpower at 8 ("[T]he state approval process has become extremely routinized and often takes only 30 to 45 days"); Focal and Pac-West at 13 (noting that Qwest can offer greater timing flexibility by including more terms in SGATs and by allowing adoption of previously arbitrated or negotiated agreements). In short, Qwest's purported "practical" concerns have no real-world basis.

Qwest also takes issue with AT&T's position regarding agreements concerning services or elements that are not subject to the regulatory framework of the 1996 Act. Qwest Reply at 20-22. AT&T agrees that truly independent agreements to provide services not subject to the 1996 Act's obligations are not interconnection agreements governed by section 252(a)(1) and need not be filed, but where parties have either included terms relating to such services in an interconnection agreement, or have negotiated such terms in conjunction with a nominally separate interconnection agreement, then such agreements are governed by section 252(a)(1) and must be filed. AT&T at 17-18. Qwest contends that this position is "legally unsupportable" because it would subject matters that are not covered by the 1996 Act to the opt-in requirements of section 252(i). Qwest Reply at 21. But the opt-in requirements of section 252(i) apply to "any interconnection, service, or network element provided under an agreement approved under" section 252, which requires negotiation of agreements "[u]pon receiving a request for

[4] Nor would CLECs agree with Qwest's characterization that it "has been widely praised for its willingness to work collaboratively with CLECs and to rapidly address their operational concerns without need for intervention by regulators." Qwest Reply at 16. Far from working "collaboratively" with CLECs to accelerate the opening of its local markets to competition, Qwest has taken every opportunity to implement schemes to prevent that from happening, as illustrated by the Minnesota Public Utility Commission's recent determination that Qwest unlawfully refused to allow AT&T even to test a network element-based competitive local offering (and then deliberately fabricated evidence in an attempt to defend its gross misconduct). *See In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. against Qwest Corporation*, Docket No. P-421/C-01-391, Order Granting Temporary Relief and Notice and Order for Hearing, issued April 30, 2001.

interconnection, services, or network elements pursuant to section 251" of the Act, *id.* § 252(a)(1).[5]

Qwest concedes that it has entered into unfiled agreements with CLECs in which the CLECs agreed not to participate in regulatory proceedings regarding Qwest's section 271 applications, but asserts that there is "nothing even remotely improper" about such agreements. Qwest Reply at 28-29. Qwest acknowledges, however, that state commissions have taken a different view. *Id.* at 28 n.52. Specifically, the Arizona Corporation Commission Staff has recommended fining Qwest for failing to file certain agreements, and has recommended higher fines for agreements in which CLECs agreed not to oppose Qwest's section 271 applications on the ground that "agreements which attempt to suppress participation by all parties for full development of the record" in such proceedings "are not in the public interest." Arizona Corporation Commission, Staff Report and Recommendation in the Matter of Qwest Corporation's Compliance with Section 252(e) of the Telecommunications Act of 1996, Docket No. RT-00000F-02-0271, at 1 (June 7, 2002).

That is clearly correct – Qwest's secret deals prevent full development of the regulatory record, which is critical to the integrity of both state section 271 proceedings and proceedings before the Commission. As the Commission has recognized, the provisions of the 1996 Act that are directed at opening local exchange markets "depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations." *Michigan 271 Order* ¶ 397. Moreover, a central issue in any section 271 proceeding is whether the applicant is, in fact, offering nondiscriminatory interconnection and access to network elements (and can be counted upon to continue to do so). When Qwest buys the silence of CLECs in state or federal section 271 proceedings, then the record on these critical issues is unreliable. Specifically, state commissions and this Commission cannot rely on the *absence* in the record of evidence of discrimination, anticompetitive conduct or performance problems because CLECs with knowledge of such problems simply may have been bought off. Indeed, by providing superior service to its secret deals partners, a BOC can even skew the performance data upon which section 271 findings are made. The regulatory record becomes suspect and the entire review process is cast into doubt.

At the end of the day, Qwest's assertion that it merely wants to be sure that it "meet[s] the requirements of the Act in all respects," Qwest Reply at 2, is belied by its conduct. If Qwest's real objective were to comply with the law, it would have filed its agreements in the first place or would file them now. Its continued failure to do so demonstrates its true objective

[5] Qwest's reference to portions of the *Local Competition Order* in which the Commission approved the practice of "link[ing] section 252 negotiations to negotiations on a separate matter" is inapposite here. Qwest Reply at 21-22 (quoting *Local Competition Order* ¶ 153). AT&T does not contend that parties cannot negotiate in this manner, just that the agreements must be filed.

in filing the Petition – to seek cover for its unlawful failure to file secret, discriminatory agreements and to avoid the fatal section 271 consequences of that misconduct.

Sincerely,

/s/ Jacqueline G. Cooper

Jacqueline G. Cooper

cc: Michelle Carey
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